S.B. CIVIL SECOND APPEAL NO.162/2002

Smt. Santosh Devi & Ors. vs. Vimal Kumar and ors.

Date : 13.9.2005

HON'BLE MR. PRAKASH TATIA, J.

Mr. SG Ojha, for the appellants.
Dr. A.A. Bhansali, for the respondents.

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Heard learned counsel for the parties.

Brief facts of the case are that the suit property was mortgaged by the plaintiff's ancestors on 26.6.1952 to the firm M/s. Lalchand Kesrimal. The amount received by mortgagor from mortgagee is Rs.1,000/-. On 5.10.1967, a loan of Rs.1,000/- was further taken by the mortgagor from mortgagee and fresh deed dated 5.10.1967 was executed. Both the mortgage deeds are registered. The plaintiff filed the suit for redemption of mortgaged property on 16.8.1985 by impleading Ramgopal, Madan Lal and Mohan Lal as defendant. According to the plaintiff, the said firm Lalchand Kesrimal was the joint Hindu Family firm and the karta of the family was Haridas s/o Kesrimal. Haridas died leaving behind his legal representatives Takhat Mal and Kesrimal. The plaintiff stated as per his knowledge, the defendant no.2 is son of Takhat Mal and the defendants no.3 to 7 are sons of deceased Kesrimal. According to the plaintiff, in fact, the defendant no.2 alone is in possession of the property but since they all are descendants of the original

mortgagee, therefore, they have been impleaded as party in the suit. The plaintiff further pleaded that in case the plaintiff will come to know about the other family members of mortgagee, then he will implead those co-parceners also as party in th suit. However, according to the plaintiff, the estate of the mortgagee is fully represented by the defendants. It is also specifically submitted that the defendants no.2 to 7 also sufficiently represents the estate of firm M/s. Lalchand Kesrimal.

The defendant no.2 submitted written statement and stated that neither Harak Chand nor Vimal Kumar has any right in the property in dispute nor they were in possession. The defendant no.2 even denied the existence of the said firm and also denied that Haridas was Manger or Karta of the firm. Substantially each and every fact has been denied by the defendant no.2 but for mortgage deeds, the defendant no.2 stated that he has no knowledge of the said mortgage but according to him, the mortgage deeds are fabricated documents only and the property is in possession of the defendant no.2 and he is living therein as owner of the property.

The trial court framed the issues and the issue no.1 was with respect to the mortgage. An issue was framed on the plea taken by the defendants that the suit is barred by time and the suit of the plaintiff is not maintainable because the plaintiff in this suit impleaded the firm Lalchand Kesrimal as party defendant and he withdrew the suit against the firm, therefore, the present suit deserves to be dismissed. The defendants also claimed ownership by

adverse possession.

In the trial court, both the parties produced evidence and to rebut the evidence of the plaintiff, only witness Santosh Bhatia – descendant of Ram Gopal appeared in the witness box.

The trial court held that Exhibits-9 and 10 are the certified copies of the original mortgage deeds and they are not admissible in evidence despite the fact that the documents were not only taken on record but already admitted in evidence and the documents were marked as Exhibits-9 and 10. The trial court also observed that the defendants are not the partners of the mortgagee firm and since the suit is not against the firm. The trial court also held the suit to be barred by time by counting limitation from 26.6.1952 as that was the date of first mortgage. The trial court also held that since the suit against the firm has been withdrawn, therefore, the suit is not maintainable.

Against the judgment and decree of the trial court dated 21.12.1998, the plaintiff preferred appeal and the first appellate court allowed the appeal vide judgment and decree dated 11.7.2002. The first appellate court held that the limitation should have been taken from the second mortgage i.e. 5.10.1967 and there is no effect of withdrawal of the suit against the firm which is no more in existence. The mortgage stood fully proved and the defendants are the descendants of the partners of the said firm. The said firm was not in existence even when the suit was filed, therefore, the present defendants were impleaded

as party and since the house is in possession of one of the descendants of the partners of the firm, therefore, the plaintiff has right to redeem the property.

According to learned counsel for the appellants, the first appellate court committed serious error of law in relying upon the mortgage deeds Exhibits-9 and 10. According to learned counsel for the appellants, these mortgage deeds were not admissible in evidence and no permission was obtained by the plaintiff for producing the secondary evidence, therefore, the first appellate court committed serious error of law in accepting the Exhibits-9 and 10 as admissible in evidence. It is also submitted that the property was mortgaged on 26.6.1952 and the suit was filed in the year 1985, therefore, the suit is barred by time. It is also submitted that the plaintiff filed the suit against the alleged mortgagee firm and withdrawn the suit, therefore, the plaintiff's suit for redemption of mortgaged property against the defendants was not maintainable and the first appellate court committed serious error of law in holding the suit of the plaintiff as maintainable.

Learned counsel for the respondents vehemently submitted that the mortgage deeds dated 26.6.1952 and 5.10.1967 were admitted in evidence in presence of the appellants and, therefore, the appellants have no right to raise any objection when the documents have already been admitted. It is also submitted that the documents are

certified copies of the mortgage deeds and the original documents were registered documents is not in dispute. In view of the above, if the first appellate court, after considering not only facts but the legal position also, held the documents as admissible, then there is any illegality in the judgment of the first appellate court rather the appellants have no right to raise objection about the admissibility of the certified copies of the registered documents. Learned counsel for the respondents also vehemently submitted that it cannot be disputed that the property was mortgaged on 26.6.1952 and thereafter, for a consideration of Rs.1,000/-, further mortgage deed was executed on 5.10.1967 which amounts to admission of the earlier mortgage in subsequent mortgage deed. Therefore, the limitation will start from 5.10.1967 and the suit was filed within 30 years from the said date, hence, the suit was within limitation.

I have considered the submissions of learned counsel for the parties and perused the reasons given in two judgments.

It is not in dispute that the plaintiff produced the certified copies of the mortgage deeds and they were admitted in evidence in the presence of the defendants by the trial court. The trial court once admitted the documents in evidence and the documents are certified copies of registered documents and the original documents are not the documents inadmissible in evidence, therefore,

the trial court once admitted the document should not have reconsidered the matter about admissibility of the document again at the time of deciding the suit. Apart from it, once the documents have been admitted, that assured the plaintiff that he need not to summon the original document. Had there been an objection at proper time, the plaintiff would have summoned or produced the original documents or would have filed an application to meet with the objection of the defendants about the admissibility of the documents. Therefore, at such a belated stage, such an objection should not have been entertained by the trial court putting the plaintiff in such a situation where he would be trapped only in procedural defects without getting any opportunity to correct the mistake which mistake could have been corrected if the objection would have been taken at the appropriate time. The technicalities of law cannot and should not come in the way of legitimate claims. The appellate court only corrected the mistake committed by the trial court and, therefore, rightly relied upon the mortgage deeds. The plaintiff in his plaint very categorically stated that the property was mortgaged with the said firm. He also filed suit against the said firm and that was withdrawn as in fact the firm was not in existence when the suit was filed by the plaintiff. It appears that the said firm was not in existence since long and, therefore, to overcome from the difficulty, the plaintiff withdrew the suit as legal representatives of partners of the said firm were already party in the suit with clear statement that the firm was joint hindu family firm. In

view of the above, the plaintiff, finding that the said firm is no more in existence, withdrew the suit. That was hardly a defect in the present suit in view of the fact that it is nobody's case that the said firm is in existence. Apart from it, the persons who could have represented the said firm are also party in the suit and the first appellate court considered the facts how the defendants are descendants of the partners of the firm. Therefore, in view of this finding of fact recorded by the first appellate court that the defendants are descendants of the partners of the mortgagee firm, they represents the estate of the deceased sole proprietor, karta and manager of the joint hindu firm of the defendants and the defendants also represent the estate of the said firm.

In view of the above also, the first appellate court rightly reversed the finding recorded by the trial court.

In view of the above, I do not find any merit in this appeal. No substantial question of law is involved in this appeal. Accordingly, this appeal is dismissed.

(PRAKASH TATIA), J.

S.Phophaliya